Supreme Court, U. S.
FILED
AUG 18 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-83

G.E.M. CORP., dba,
GENE THOMAS CASCADE LOUNGE,
Petitioner,

vs.

LIQUOR CONTROL COMMISSION OF
THE STATE OF OHIO,
Respondent.

On Petition For Writ Of Certiorari
To The Court Of Appeals For The Ninth
Appellate Judicial District Of The State Of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Table of Authorities ..... **ii**

Question Presented **01**

Statement of the Case **01**

Argument **02-5**

Conclusion **05**

Appendix **06-8**

TABLE OF AUTHORITIES

Cases

	Page No.
Application of Roberts, 358 F. Supp. 392, (1973)	02
California v. LaRue, 409 U.S. 109 (1972)	02
Cherbonnie v. Kugler, 359 F. Supp. 256, (1973)	02
Gryger v. Burke, 334 U.S. 728 (1948)	03
House of York Limited vs. Ring, 322 F. Supp. 530, (1970)	02
Krauss vs. Sacramento Inn, 314 F. Supp. 171 (1970)	02
National Railroad Passenger Corp. v. Miller, 358 F. Supp. 1321, affd. 414 U.S. 948 (1973)	02
Snowden vs. Hughes, et al., 321 U.S. 804 (1944)	03
Thomas Phillips Company vs. Dover Machine Products Inc., 154 Ohio St. 235	03

STATUTES

Section 4303.271, Revised Code	01
Section 119.12, Revised Code	02
Section 4301.04 (G), Ohio Revised Code	04, 05

OTHER AUTHORITIES

Rule 19 of the Rules of the United States Supreme Court	02
Regulation 65, Section XI, Revised Code	03

QUESTION PRESENTED

May a decision by the state Courts, under a state statute on a question of state law, be re-interpreted by the United States Supreme Court for deciding whether a due process question is presented?

Statement of the Case

This case involves a rejection of Petitioner's renewal applications for its classes D-5 and D-6 liquor licenses under Ohio Revised Code Section 4303.271 which provides that the permits in question shall be renewed *unless* the Department rejects the applications for good cause.

On January 17, 1973, pursuant to assignment and notice thereof, the case was called for hearing before the Liquor Control Commission. The record before the Commission consisted of the recorded testimony and proceedings before the Commission and exhibits received into evidence. The evidence presented to the Commission consisted of the frequenting of the bar and loitering on the premises of known and convicted prostitutes, large number of arrests made on the permit premises for solicitation for prostitution, numerous assaults and other crimes which occurred on the premises and the numerous police runs to the premises. The Commission subsequently, on January 24, 1973, refused to renew petitioner's class D-5 and D-6 liquor permits.

On February 2, 1973, petitioner appealed the decision and order of the Ohio Liquor Control Commission to the Court of Common Pleas of Summit County, Ohio. (See Appendix p A 1). That notice of appeal does not challenge the constitutionality of the proceeding before the Ohio Liquor Control Commission.

ARGUMENT

Petitioner is unable to show any of the considerations set forth in Rule 19 of the Rules of this Court, or any other reasons why this Court should review the decision of the Court of Appeals of the State of Ohio.

The broad sweep of the Twenty-First Amendment to the United States Constitution creates an almost plenary power to the state to regulate distribution and sale of liquor within its borders. *Krauss v. Sacramento Inn*, 314 F. Supp. 171 (1970), *House of York Limited v. Ring*, 322 F. Supp. 530, (1970), *California v. LaRue*, 409 U.S. 109 rehearing denied 410 U.S. 948 (1972).

Under the Twenty-First Amendment, a liquor license is nothing more than a personal privilege to participate in the monopoly granted to the state by the Twenty-First Amendment to the United States Constitution. *Application of Roberts*, 358 F. Supp. 392, (1973).

Therefore, state legislation prohibiting or regulating use of intoxicating liquor or to promote common good, cannot be questioned under the Fourteenth Amendment or any other provision of the United States Constitution. *National Railroad Passenger Corp., v. Miller*, 358 F. Supp. 1321, affd. 414 U.S. 948 (1973); *Cherbonnie v. Kugler*, 359 F. Supp. 256, (1973).

The Petitioner was notified of the charges, given an opportunity to respond to the charges, to present witnesses under oath, to confront and cross-examine witnesses, to have a transcript available, and to appeal any adverse decision under Ohio Revised Code, Section 119.12. This procedure certainly meets a reasonable minimum standard of proceedural steps.

Further, due process does not mean infallible process of law. Under a state statute, it is for the state courts to decide a question of state law, and the United States Supreme Court is not at liberty to conjecture that the trial court acted under an interpretation of state law different from that which the Supreme Court might adopt, and then set up its own interpretation for deciding that due process has or has not been denied. A mere error of state law, if one had occurred, is not a denial of due process. *Gryger v. Burke*, 334 U.S. 728 (1948); *Snowden v. Hughes* et al., 321 U.S. 804 (1944).

In the instant case, no error of state law has occurred. It should be noted that the record of the hearing before the Liquor Control Commission specifically recites that all three members were present at such hearing. Even if we assume for a moment that one of them was not present when such testimony was taken, this absence makes absolutely no difference. Of the other two members who sat on the case, one voted to affirm the director, and the other voted to reverse. In other words a tie vote resulted between the two members. Regulation 65, Section XI of the Liquor Control Commission provides:

> "In the event of a tie vote by the Commission the same shall constitute an affirmance of the action taken by the Director."

The Ohio Supreme Court has specifically recognized that a tie vote should result in an affirmance of the lower court. In *Thomas Phillips Company vs. Dover Machine Products Inc.*, 154 Ohio St. 235.

Again, assuming for purposes of argument that the third member of the Commission was not present at the hearing the authority for such member to review

the evidence and vote thereon is Ohio Revised Code Section 4301.04 (G) which specifically provides:

> "The liquor control commission has the following powers which it may exercise by the vote of a majority of the commissioners."
>
> "(G) For the purpose of any hearing . . ., the liquor control commission or any member thereof, . . . may administer oaths, take depositions, . . . and testimony."

At the time of the hearing a court stenographer recorded the entire proceedings. Similarly, in all cases before the Commission a tape recorder is used to record the testimony of the witnesses. When the Commission confers to decide the case, the taped testimony is available for the Commission to review before making their decision, in this case the case was heard on January 17, 1973, and the decision was formalized and mailed on January 24, 1973.

The statute Ohio Revised Code, Section 4301.04, makes no express provision on the point of how the evidence thus adduced at a hearing conducted by a member is to be brought to the attention of the full board, it does not require a review of a certified record, but fairly implies that such member must cause some record to be made of such evidence for review by the board as a whole. To this end a tape recording was made of all testimony.

The order of the Commission specifically states that the case "was submitted to the Liquor Control Commission on the evidence, and on consideration thereof said Commission finds the objection offered thereto were reasonable and well-founded." According to such order, all three commissioners reviewed the evidence before any decision was made. Certainly, since Section

4301.04(G), supra, specifically allows one commissioner to hear a case, it would be necessary for at least one other Commissioner to review the evidence before a quorum of the Commission can act thereon. Here, all three Commissioners signed the order indicating that the evidence had been reviewed, and in the absence of the contradictory evidence it must be presumed that such order is proper.

Petitioner did not claim a constitutional violation when it originally appealed to the Common Pleas Court of Summit County, Ohio, and even if allowed to raise a constitutional violation in a subsequent proceeding, it has failed to present an important question of federal law. In addition, the interest for which petitioner seeks protection is not sufficient to constitute a property right or a liberty interest within the meaning of the due process clause.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX A
IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

CASE No. 73 2 242

G. E. M. CORPORATION
dba GENE THOMAS' CASCADE LOUNGE
formerly ELI'S CASCADE LOUNGE,
23 South Main Street,
Akron, Ohio 44308,

Appellant,

vs.

BOARD OF LIQUOR CONTROL OF
THE STATE OF OHIO,
219 South High Street,
Columbus, Ohio,

Appellee.

NOTICE OF APPEAL

The Appellant, G. E. M. CORPORATION, dba GENE THOMAS' CASCADE LOUNGE, formerly ELI'S CASCADE LOUNGE, gives notice that it is appealing from the Board of Liquor Control to the Court of Common Pleas of Summit County, Ohio, the decision, finding and order made by the Board of Liquor Control of the State of Ohio in this cause on or about January 24, 1973. The finding, decision and order made by the Board of Liquor Control in the cause reads as follows:

> "This cause coming on for hearing on the appeal of G. E. M. CORPORATION, dba GENE THOMAS' CASCADE LOUNGE (formerly ELI'S CASCADE LOUNGE), 23 South Main Street, Akron, Ohio was submitted to the Liquor Control Commission on the evidence, and on consideration thereof said Commission finds that the local authorities having the primary responsibility

for the enforcement of law and order in the community objected to the reissuance of the subject permits and that the objections offered thereto were reasonable and well-founded. The Commission further finds from the evidence that the appellant is not a proper person to be the holder of any type of license issued by the Department of Liquor Control, in view of the manner in which the permit business had been operated in the past and as evidenced by the number of arrests made upon the permit premises and indicative of appellant's general disregard for law and order, and that by reason thereof the appellant is not entitled to the reissuance of the Class D-5 and D-6 permits and that the application filed therefor should be denied.

It is therefore ordered that the within appeal be, and the same hereby is, dismissed, effective January 31, 1973."

LIQUOR CONTROL COMMISSION—
STATE OF OHIO
Kenneth E. Thomas—Chairman
Fred J. Krumholtz—Member
G. D. Tablack—Vice Chairman—dissents
Mailed January 24, 1973

Said appeal is taken to the Court of Common Pleas of Summit County as provided by the Revised Code of Ohio from an order, decision, and finding made by the Board of Liquor Control of the State of Ohio.

G. E. M. CORPORATION, dba GENE THOMAS' CASCADE LOUNGE is the Appellant and the Board of Liquor Control of the State of Ohio is the Apellee herein.

Appellant says that there is error in said record and proceedings before the Board of Liquor Control of the State of Ohio in this, to-wit:

1. That the finding, decision and order of the Board of Liquor Control is contrary to the weight of the evidence.

2. That the finding, decision and order of the Board of Liquor Control is not supported by reliable, probative and substantial evidence.
3. That the finding, decision and order of the Board of Liquor Control is unreasonable, arbitrary and contrary to law.
4. That the alleged violations by the appellant in law and/or in fact are not violations of any Regulations or Statutes of the State of Ohio.
5. That there is other error apparent upon the record in the proceedings of the Board of Liquor Control to the prejudice of the appellant.

Appellant further says that at the hearing on January 17, 1973 Chairman Kenneth Thomas and Vice-Chairman G. D. Tablack were the only members of the Commission hearing said appeal by the Appellant.

That during the course of the hearing, member Fred J. Krumholtz was not present and did not participate at said hearing.

Appellant further says that the order of the Board of Liquor Control indicates that Fred Krumholtz voted in favor of the Department of Liquor Control and against the Appellant, although he was not present and did not participate.

Appellant further contends that as the matter of law the conduct of Krumholtz was arbitrary, illegal, improper and contrary to law and as a result thereof, his vote should be voided, leaving the Commission without a majority vote.

/s/ TED CHUPARKOFF,
TED CHUPARKOFF,
Attorney for Appellant